

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

MILAGRO D. PALOMO NOLASCO
Claimant

VS.

HAYES COMPANY, INC.
Self-Insured Respondent

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Docket No. 1,037,669

ORDER

STATEMENT OF THE CASE

Claimant requested review of the September 24, 2012, Award entered by Special Administrative Law Judge John C. Nodgaard. The Board heard oral argument on February 20, 2013. Thomas M. Warner, Jr., of Wichita, Kansas, appeared for claimant. Terry J. Torline, of Wichita, Kansas, appeared for the self-insured respondent.

The Special Administrative Law Judge (SALJ) found claimant's average weekly wage (AWW) was \$354.21. Further, the SALJ found claimant suffered no permanent impairment to her lower back as a result of the January 9, 2007, injury. Based upon the testimony of Drs. Stein, Do, and Murati, the SALJ found claimant had a 10.5 percent permanent partial impairment to her left lower extremity. The SALJ found because claimant is limited to a scheduled injury, she is not entitled to a work disability. Also, the SALJ found if claimant had been entitled to a work disability, she did not prove a percentage of task loss because Karen Terrill's task loss list was inaccurate. The SALJ concluded respondent is entitled to a credit against the Award in the amount of \$4,011.89 for unearned wages paid to claimant.

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

Claimant requests review of the SALJ's finding that she is limited to a permanent partial impairment of her left lower extremity. Claimant argues she suffered injuries to her lower back in the accident and is entitled to an award of functional disability to the body as a whole, as well as a work disability. Claimant contends the SALJ erred in finding Karen Terrill's task loss list was inaccurate and argues she is entitled to a task loss based on Dr.

Do's task loss opinion using the list prepared by Ms. Terrill. Claimant further argues the SALJ erred in calculating her AWW. The correct AWW should be \$368.09, making her compensation rate \$245.41. Using the benefit compensation rate of \$245.41, claimant argues she was underpaid temporary total disability benefits by respondent and is entitled to an underpayment. Claimant also argues that respondent is not entitled to a credit for payment of unearned wages.

Respondent argues claimant did not prove she suffered permanent impairment to her lower back as a result of the work-related injury. Further, respondent asks the Board to affirm the SALJ's finding that Ms. Terrill's task list was inaccurate. Respondent asks the Board to modify the SALJ's Award to find that claimant suffered a 6.67 percent permanent partial impairment to her left lower extremity based on an average of the rating opinions of Drs. Stein, Murati, and Do, minus any consideration of Dr. Murati's rating for trochanteric bursitis.

The issues for the Board's review are:

1. What is the nature and extent of claimant's disability? Did claimant prove her low back impairment was related to her accident at work on January 9, 2007?
2. If the Board finds claimant is entitled to an impairment to the body as a whole, did claimant prove a task loss?
3. Was there an underpayment of temporary total disability?
4. Is respondent entitled to a credit for unearned wages?

FINDINGS OF FACT

Claimant worked for respondent as a laborer. On January 9, 2007, her left leg was run over by a forklift, knocking her to the ground and causing a fracture of her left fibula and tibia. She is claiming injuries to her lower back. Claimant admitted she did not initially report her back problems to her medical providers or to respondent. Claimant said she fell to the floor after she was hit by the forklift, and it is logical that she injured her back. Claimant said the back pain began when she started working her normal job. She said she told respondent her back hurt in September 2007, and she was told she had no restrictions for her back. She has received treatment for her broken leg from Dr. Anthony Pollock and for her left knee and lower back from Dr. Patrick Do.

Dr. Patrick Do, a board certified orthopedic surgeon, examined claimant on December 18, 2008, at the request of the ALJ. In reviewing claimant's medical records, Dr. Do found an MRI dated July 18, 2008, showed she had mild disc desiccation at L4-5. An MRI of her left knee taken the same day showed she had some thickening and irregularity of the patellar tendon. Dr. Do admitted there was no mention of a low back

injury in the medical records from the hospital where claimant was taken after she suffered her broken leg on January 9, 2007.

Dr. Do diagnosed claimant with left knee pain with some instability and crepitus and low back pain, mostly myofascial. After his initial examination, Dr. Do treated claimant's knee and low back. Claimant was sent to physical therapy. On April 16, 2009, claimant had a cortisone injection in her lower back. On May 14, 2009, claimant underwent arthroscopic chondroplasty of her left knee performed by Dr. John Babb. Cortisone injections were given to claimant on May 15, 2009, June 5, 2009, and June 25, 2009. She was found to be at maximum medical improvement for her left knee on August 21, 2009, with no permanent restrictions. Claimant continued to be seen by Dr. Do for her low back pain. He sent her to Dr. Matthew Henry, a neurosurgeon, for a consultation in September 2009. Dr. Henry did not recommend surgery. Dr. Henry recommended claimant see a physiatrist. Dr. Do agreed with Dr. Henry's recommendation that claimant be seen by a physiatrist. Dr. Do then found claimant to be at maximum medical improvement for her low back on October 13, 2009.

Using the *AMA Guides*,¹ Dr. Do rated claimant as having a 5 percent left lower extremity impairment for her chondroplasty patella, which would convert to a 2 percent impairment to the whole body. He also placed claimant in DRE Lumbosacral Category II, which correlates to a 5 percent whole person impairment. This would give claimant a 7 percent permanent partial impairment to the whole body. Dr. Do stated he had no evidence other than claimant's injuries were work-related, but he also admitted he cannot state within a reasonable degree of medical probability that the permanent impairment rating for restrictions provided for claimant's low back are causally related to the injury of January 9, 2007.

Dr. Do gave claimant restrictions limiting lifting and carrying to under 20 pounds continuously and under 50 pounds occasionally, with no lifting greater than 51 pounds. She could push and pull to 25 pounds continuously, to 50 pounds frequently, and to 75 pounds occasionally, with no pushing or pulling greater than 76 pounds. She could bend at 90 degrees frequently and twist and turn frequently.

Dr. Do reviewed a task loss list prepared by Karen Terrill. He opined that of the 22 unduplicated tasks on the list, claimant was unable to perform 5 for a 23 percent task loss.

Dr. Pedro Murati, a board certified independent medical examiner, evaluated claimant on June 9, 2010, at the request of claimant's attorney. Claimant complained of left tibia and fibula pain, which caused trouble walking, standing, sitting, riding in a car, lifting and bending. She also complained of left leg pain and cramps and left ankle pain.

¹ American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

After examining claimant, Dr. Murati diagnosed her with low back pain with signs and symptoms of radiculopathy; right SI joint dysfunction; status post irrigation and debridement with open reduction and intramedullary nailing of the left tibia using T-2 components, at maximum medical improvement; status post multiple hardware removal, at maximum medical improvement; and right cruciate and collateral instability. He opined claimant's diagnoses were, within reasonable medical probability, a result of the work-related injury of January 9, 2007. He recommended further testing of the low back. Based on the results, he said claimant could benefit from medication, physical therapy, and lumbar epidural steroid injections. He recommended cortisone injections for claimant's SI joint dysfunction, as well as physical therapy and temporary restrictions.

Dr. Murati saw claimant on March 14, 2011, again at the request of claimant's attorney, in order to calculate an impairment rating. Claimant told Dr. Murati that in August 2010, she underwent a series of lumbar epidural steroid injections which only gave her temporary relief. At the time of the March 2011 examination, claimant was complaining of pain in the lower part of her left leg and ankle when she bent over. She still had pain in her left ankle. She had increased pain after standing all day and when sitting too long. Claimant denied any significant previous injuries to her low back or left lower extremity.

After his examination, Dr. Murati diagnosed claimant with low back pain with signs and symptoms of radiculopathy, right SI joint dysfunction, status post irrigation and debridement with open reduction and intramedullary nailing of the left tibia using T-2 components, and left trochanteric bursitis. Dr. Murati acknowledged he did not diagnose claimant with left trochanteric bursitis on June 9, 2010. In his examination in March 2011, Dr. Murati found some tenderness in the area of the left trochanteric bursa that he did not find in June 2010. Dr. Murati agreed with respondent's attorney that none of claimant's other treating or examining medical providers diagnosed her with trochanteric bursitis. Dr. Murati said trochanteric bursitis might be expected if claimant continued to work a manual labor type job, and it would be a natural, probable consequence of her leg and back injuries. He said trochanteric bursitis is not progressive, but it is chronic, and that but for claimant being run over by a forklift, it is not likely she would have developed trochanteric bursitis.

The only permanent restriction Dr. Murati placed on claimant was to work as tolerated and to use common sense. He would not recommend claimant do any heavy lifting or perform work requiring a lot of bending or walking. Dr. Murati again opined that claimant's diagnoses were a direct result of her work-related injury.

Using the *AMA Guides*, Dr. Murati rated claimant as having a 10 percent impairment to the left lower extremity for atrophy of the left calf and a 7 percent impairment to the left lower extremity for left trochanteric bursitis. Those impairments combine for a 16 percent left lower extremity impairment, which converts to a 6 percent whole person impairment. For claimant's low back pain with signs and symptoms of radiculopathy, Dr. Murati placed claimant in DRE Lumbosacral Category III for a 10 percent whole person impairment.

Claimant's whole person impairments would combine for a total 15 percent whole person impairment. Dr. Murati was the only physician who placed claimant in DRE Category III. He said he did so because he found she had signs of radiculopathy, including missing hamstring reflexes bilaterally, as well as weakness and loss of sensation.

Dr. Paul Stein, a board certified neurosurgeon, examined claimant on May 8, 2008, at the request of respondent. Claimant reported pain in her left ankle and left knee, but her worst pain at the time of her visit was to her lower back. Claimant told Dr. Stein that after returning to work from her original injury, she had increasing back pain, which she related to repetitively pulling cabinets from the line and stacking them on pallets.

In his examination, Dr. Stein noted claimant walked with a mild left-sided limp. She had some moderate restriction of range of motion of the lower back. She had some diffuse tenderness to palpation in the lower back but nothing focal. There was no muscular spasm. She had no radicular symptoms, no sensory deficit and no atrophy in her lower extremities. There was no instability of her left knee but mild crepitus was present; range of motion was intact.

After taking a history from claimant, reviewing her medical history and performing a physical examination, Dr. Stein believed claimant had sustained a fracture of the left tibia and fibula, for which she had undergone surgery. The fractures healed, and she subsequently had some of the hardware removed. Dr. Stein believed claimant had reached maximum medical improvement for the left lower extremity. However, he recommended an x-ray to determine whether there was any permanent angulation at the fracture site. If there was no angulation, it was Dr. Stein's opinion that claimant had no permanent impairment of function from the fractures themselves, although he thought it might be reasonable to provide her with some impairment for her complaints of residual pain. Dr. Stein also recommended an MRI scan of claimant's left knee and an MRI scan and x-rays with flexion and extension of claimant's lower back to determine if there was any underlying pathology in that area. Dr. Stein did not recommend any permanent work restrictions.

On August 7, 2008, Dr. Stein reviewed the radiologist's report of the MRI scan taken of claimant's left knee per the recommendation in Dr. Stein's May 8, 2008, report. The radiologist indicated there was some thickening and irregularity in the patellar tendon and a possible partial ACL tear. Dr. Stein recommended an orthopedic consultation with Dr. Pollock regarding claimant's left knee. Dr. Stein said x-rays of claimant's lower back showed no evidence of instability. The MRI scan of the lower back showed mild drying out of the L5-S1 disc, which was age appropriate, but no disc herniation, loss of disc space height or nerve root compression. Dr. Stein did not believe there was any documentary objective evidence of permanent impairment of function related to the lower back and recommended no restrictions in relation to the lower back. Dr. Stein said his opinion with respect to claimant's lower back was consistent with and based on the *AMA Guides*.

Dr. Stein admitted the x-rays he previously recommended be taken of claimant's fracture site were not taken. If he were to assume the x-rays would have shown no angulation of the fracture, he would assign claimant a 5 percent impairment to the left lower extremity for residual pain. Because he recommended claimant be seen by Dr. Pollock for her left knee, he had no opinion on any permanent impairment associated with that issue.

Karen Terrill, a rehabilitation consultant, interviewed claimant utilizing an interpreter on November 28, 2011, at the request of claimant's attorney. She then compiled a list of 22 unduplicated job tasks claimant had performed in the 15-year period prior to claimant's accident of January 9, 2007.

Claimant told Ms. Terrill she completed the 6th grade in El Salvador. She immigrated to the United States in 1998. She is able to read and write in Spanish and has the equivalent of a third grade education in regard to her math ability. She has no skills not reflected in her work history. She had limited knowledge of computers. Claimant continued to work for respondent until September 2011, when she was laid off. She was not working at the time Ms. Terrill interviewed her.

Ms. Terrill testified that at the end of her interview with claimant, she asked claimant if the information she provided about her jobs and job tasks was to the best of her ability. Claimant said it was. Ms. Terrill asked claimant if there were any additional jobs she remembered, and claimant said there were not. Ms. Terrill stated she had interviewed housekeepers previously and also stated, "[t]his is not the first time I've heard someone describe their work out at Hayes Company, and what she was describing was within the realm of what I have heard other employees describe to me."²

Ms. Terrill did not review a Social Security Earnings Record relative to claimant and said she leaves it up to the individual to provide one in order to identify previous employers. Ms. Terrill stated:

[I]t is their work history and they need to take responsibility for identifying who the employers are and the jobs because it might just say the Hayes Company but it gives no further explanation. The Hayes Company has hundreds of different jobs within that, so it's up to them to let me know what they did for each employer.³

Ms. Terrill did not make any attempt to verify the accuracy of claimant's list of previous employers or job tasks. She did not do a job analysis of any of the jobs or job tasks contained in her report. The job tasks listed in Ms. Terrill's report and the physical

² Terrill Depo. at 13.

³ Terrill Depo. at 18.

requirements necessary to perform those jobs tasks are based solely on the information claimant provided to Ms. Terrill.

Kathy McClure is respondent's Human Resources Director. In her position, she is familiar with the job position descriptions at respondent. She writes and adjusts job descriptions.

Ms. McClure said claimant performed the job of a trainer while working at respondent. The job position description of trainer was attached as an exhibit to Ms. McClure's deposition. Ms. McClure said there were a couple of items on the trainer position description that claimant may not have performed on a day-to-day basis, such as documenting training or completing a certificate of paperwork. Ms. McClure said claimant performed the rest of the job tasks on the position description. On cross-examination, Ms. McClure provided an estimate of the amount of time claimant spent performing the tasks involved as a trainer. Ms. McClure acknowledged that the training position would have been a small part of claimant's normal day-to-day duties as an employee, and claimant would have been doing her regular job while training. Only if there was a large influx of employees coming in on a day would claimant work as a trainer only.

Ms. McClure was aware claimant suffered a work-related injury on January 9, 2007, and was unable to work for a period of time after the injury. Ms. McClure was aware that respondent continued to pay claimant wages despite the fact she was not working. Ms. McClure also agreed that claimant was paid wages she did not earn after she began working again on a limited basis. Ms. McClure identified an exhibit to her deposition containing a list of checks paid to claimant. The list showed the difference between the amount claimant was paid and the amount she would have been paid for the time worked was \$4,011.89. Ms. McClure stated that all of that amount was paid to claimant as unearned wages.

PRINCIPLES OF LAW

K.S.A. 44-501(a) (Furse 2000) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends." K.S.A. 44-508(g) (Furse 2000) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

K.S.A. 44-510d(a) states:

(a) Where disability, partial in character but permanent in quality, results from the injury, the injured employee shall be entitled to the compensation provided in K.S.A. 44-510h and 44-510i and amendments thereto, but shall not be entitled

to any other or further compensation for or during the first week following the injury unless such disability exists for three consecutive weeks, in which event compensation shall be paid for the first week. Thereafter compensation shall be paid for temporary total loss of use and as provided in the following schedule, 66 2/3% of the average gross weekly wages to be computed as provided in K.S.A. 44-511 and amendments thereto, except that in no case shall the weekly compensation be more than the maximum as provided for in K.S.A. 44-510c and amendments thereto. If there is an award of permanent disability as a result of the injury there shall be a presumption that disability existed immediately after the injury and compensation is to be paid for not to exceed the number of weeks allowed in the following schedule:

. . .

(15) For the loss of a lower leg, 190 weeks.

(16) For the loss of a leg, 200 weeks.

. . .

(23) Loss of a scheduled member shall be based upon permanent impairment of function to the scheduled member as determined using the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.

K.S.A. 44-510e(a) states in part:

Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

K.S.A. 2006 Supp. 44-511(b)(4) states:

If at the time of the accident the employee's money rate was fixed by the hour, the employee's average gross weekly wage shall be determined as follows: . . . (B) if the employee is a full-time hourly employee, as defined in this section, the average gross weekly wage shall be determined as follows: (i) A daily money rate shall first be found by multiplying the straight-time hour rate applicable at the time of the accident, by the customary number of working hours constituting an ordinary day in the character of work involved; (ii) the straight-time weekly rate shall be found by multiplying the daily money rate by the number of days and half days that the employee usually and regularly worked, or was expected to work, but 40 hours shall constitute the minimum hours for computing the wage of a full-time hourly employee, unless the employer's regular and customary workweek is less than 40 hours, in which case, the number of hours in such employer's regular and customary workweek shall govern; (iii) the average weekly overtime of the employee shall be the total amount earned by the employee in excess of the amount of straight-time money earned by the employee during the 26 calendar weeks immediately preceding the date of the accident, or during the actual number of such weeks the employee was employed if less than 26 weeks, divided by the number of such weeks; and (iv) the average gross weekly wage of a full-time hourly employee shall be the total of the straight-time weekly rate, the average weekly overtime and the weekly average of any additional compensation.

K.S.A. 44-510f(b) (Furse 2000) states:

If an employer shall voluntarily pay unearned wages to an employee in addition to and in excess of any amount of disability benefits to which the employee is entitled under the workers compensation act, the excess amount paid shall be allowed as a credit to the employer in any final lump-sum settlement, or may be withheld from the employee's wages in weekly amounts the same as the weekly amount or amounts paid in excess of compensation due, but not until and unless the employee's average gross weekly wage for the calendar year exceeds 125% of the state's average weekly wage, determined as provided in K.S.A. 44-511 and amendments thereto. The provisions of this subsection shall not apply to any employer who pays any such unearned wages to an employee pursuant to an agreement between the employer and employee or labor organization to which the employee belongs.

K.S.A. 44-510e(a) (Furse 2000) states, in part:

An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

ANALYSIS

1. What is the Nature and Extent of Disability?

The first issue that must be discussed is whether the evidence supports that claimant suffers a scheduled impairment only or a whole body impairment and work disability. Since this is a medical issue, the Board will focus on the medical evidence.

Three medical doctors testified in this matter. The first of the physicians that provided testimony in this claim was Dr. Stein. Dr. Stein examined claimant on May 8, 2008, at the request of the respondent. Upon examination, Dr. Stein recommended an MRI of claimant's low back. After reviewing the MRI taken on August 7, 2008, Dr. Stein had no treatment recommendations relating to the low back and no recommendations for restrictions. Dr. Stein also found that claimant had no permanent impairment related to her low back.

Dr. Stein examined claimant only once, over three years prior to giving his testimony. Dr. Stein's examination predated the treatment Dr. Do provided for claimant's low back. Dr. Stein's opinions will not be afforded much weight in determining if claimant suffers a low back impairment.

Dr. Murati testified on behalf of the claimant. Dr. Murati first examined claimant to determine if treatment was necessary. He later examined claimant to assess permanent disability. When he first examined claimant on June 9, 2010, Dr. Murati diagnosed low back pain with symptoms of radiculopathy. Dr. Murati recommended, inter alia, an MRI of the lumbar spine and a series of epidural injections. Dr. Murati, at the March 14, 2011 examination, assessed an impairment rating of 10 percent of the lumbosacral spine, based upon DRE Category III of the *AMA Guides*. Dr. Murati also assessed a 10 percent impairment for atrophy to the left calf and a 7 percent impairment for left hip trochanteric bursitis, which converts to a 6 percent impairment to the whole person.

Dr. Do initially examined claimant on December 18, 2008, at the request of the ALJ. Dr. Do diagnosed myofascial low back pain, without any mention of radiculopathy. He then provided treatment for the claimant's knee and low back pain. Consistent with Dr. Murati's recommendation, Dr. Do provided a series of four cortisone injections to the low back from April 16, 2009, to June 25, 2009.

On October 13, 2009, Dr. Do assessed a 5 percent whole person impairment for claimant's low back and a 5 percent impairment for the left knee. Dr. Do testified that he could not say, within a reasonable degree of medical probability, that claimant's low back impairment was related to the work injury on January 9, 2007. Dr. Do's assessment of causation for claimant's low back impairment is given more weight because he was the treating physician and had a better opportunity to observe claimant over a period of time.

Claimant has failed to prove by a preponderance of the evidence that her low back condition is related to her work-related injury.

With regard to the left hip, Dr. Murati was the only physician to diagnose left hip trochanteric bursitis. He related the hip condition to claimant's altered gait. Dr. Do provided medical treatment from January 9, 2007, through July 13, 2010, with no mention of hip pain in his records. Dr. Murati admitted that out of the 12 or 13 physicians that examined claimant, he is the only one who diagnosed trochanteric bursitis. Dr. Murati based his finding of trochanteric bursitis solely on claimant's subjective complaints of tenderness. Dr. Murati's opinion assessing impairment to claimant's hip is not supported by objective medical evidence and is given little weight. Claimant has failed to prove by a preponderance of the evidence an impairment related to the hip.

All evidence regarding the low extremity ratings at the level of the knee or below are credible. When averaged, the combined impairment to the lower extremity is 6.67 percent.

2. Was There an Underpayment of Temporary Total Disability?

The parties stipulated at the regular hearing that respondent paid \$8,299.93 over 35.16 weeks of temporary total disability compensation. This results in an actual rate paid of \$236.06 per week. Claimant disputes only the weekly benefit amount and not the number of weeks paid.

The wage statement shows that claimant was expected to work 40 hours per week.⁴ Based on the wage statement, claimant's actual hourly rate at the time of the accident was \$9.28 per hour. Claimant's average weekly overtime wages during the 26 weeks preceding her accidental injury was \$3.01.⁵ Pursuant to K.S.A. 2006 Supp 44-511(b)(4)(B), claimant's average weekly wage is \$374.21 with a compensation rate of \$249.49. Respondent underpaid temporary total disability benefits in the amount of \$13.43 per week for 35.16 weeks.

3. Is the Respondent Entitled to a Credit for Unearned Wages?

Respondent paid \$4,011.89 in unearned wages to claimant. K.S.A. 44-510f(b) entitles respondent to a credit for unearned wages, "but not until and unless the employee's average gross weekly wage for the calendar year exceeds 125 [percent] of the state's average weekly wage . . ."⁶ The state average weekly wage from February 7, 2007

⁴ McClure Depo., Ex. 4 at 1.

⁵ *Id.*

⁶ K.S.A. 44-510f(b) (Furse 2000).

to June 30, 2007 was \$643.84.⁷ 125 percent of that amount equals \$804.80. The state average weekly wage from July 1, 2007 to June 30, 2008 was \$679.81.⁸ 125 percent of that amount equals \$849.76.

The burden is on respondent to prove the threshold requirement that claimant's gross weekly wage for the calendar year 2007 exceeded 125 percent of the state's average weekly wage. The evidence does not support a finding that claimant's average gross weekly wage exceeded 125 percent of the state average weekly wage.

CONCLUSION

Claimant proved by a preponderance of the evidence that she suffers a 6.67 percent impairment to the left lower extremity as a result of her work-related injury. Claimant failed to prove that suffers a low back and hip impairment related to her work-related injury. Claimant is not entitled to work disability. Claimant was underpaid temporary total disability compensation in the amount of \$472.20. Respondent failed to sustain the burden of proving it is entitled to a credit for unearned wages.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Special Administrative Law Judge John C. Nodgaard dated September 24, 2012, is reversed in part. Claimant is entitled to a 6.67 percent impairment to the left lower extremity. Respondent underpaid temporary total disability benefits in the amount of \$472.20, and respondent is not entitled to a credit for unearned wages. All other orders are affirmed.

Claimant is entitled to 35.16 weeks of temporary total disability compensation at the rate of \$249.49 per week in the amount of \$8,772.07 followed by 10.33 weeks of permanent partial disability compensation, at the rate of \$249.49 per week in the amount of \$2,577.23 for a 6.67 percent loss of use of the lower leg, making a total award of \$11,349.30, less amounts paid, not including unearned wages.

IT IS SO ORDERED.

⁷ <http://www.dol.ks.gov/WorkComp/current.aspx>.

⁸ *Id.*

Dated this _____ day of July, 2013.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

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